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In the Supreme Court of the United States

OCTOBER TERM, 1963

RONNIE M. MOORE, PETITIONER

v.

STATE OF LOUISIANA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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"A REVIEW ON WRIT OF CERTIORARI IS NOT A MATTER OF RIGHT, BUT OF SOUND JUDICIAL DISCRETION, AND WILL BE GRANTED ONLY WHERE THERE ARE SPECIAL AND IMPORTANT REASONS THEREFOR. THE FOLLOWING, WHILE NEITHER CONTROLLING NOR FULLY MEASURING THE COURT'S DISCRETION, INDICATE THE CHARACTER OF REASONS WHICH WILL BE CONSIDERED:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this court."

Rule 19, Paragraph 1, Subsection A of this Honorable Court's Rules.

Petitioner herein was charged in a bill of information as follows:

> ". . . unlawfully did violate an ordinance of the Police Jury of East Baton Rouge Parish, Louisiana, in that he did operate and permit the operation of a mechanical contrivance and device to which loudspeakers were attached in such manner as to be a nuisance to the neighborhood."

The ordinance allegedly violated referred to in the bill of information provides as follows:

> "BE IT ORDAINED BY THE POLICE JURY OF THE PARISH OF EAST BATON ROUGE, in regular session convened, that from and after passage of this ordinance, it shall be unlawful for any person or persons, firm or corporation, to play, operate, or permit the playing or operation of phonographs, radios, bands, or any other mechanical contrivance or device which have loud speakers attached thereto, in such manner as to be a nuisance to the neighborhood, it being the purpose of this ordinance not interfere (sic) with the legitimate and orderly playing of music, but to prohibit the playing of such music in a manner calculated to disturb the peace and quiet of the neighborhood.
>
> "Section 2. Be it further ordained, etc., that any person, firm, or corporation convicted for the violation of any of the provisions of this ordinance shall be fined in a sum not to exceed Fifty Dollars ($50.00), or imprisonment in the Parish jail for not more than thirty days, or both fine and imprisonment, within the discretion of the Court.

"Section 3. Be it further ordained, etc., that the provisions of this ordinance do not apply to any municipality within the Parish of East Baton Rouge."

As set forth in petitioner's brief, pages 3-7, the evidence revealed that an automobile equipped with a rented loudspeaker system and containing petitioner and four others, was playing music and speaking intermitently through said loudspeaker system, whereby a large crowd surrounded the area, blocking the highway and sidewalks in the area. The testimony further revealed, as indicated by petitioner's brief, that certain witnesses could hear the sounds from this loudspeaker several blocks away. At the time of his arrest, petitioner had been reading from a paper which he held and he had been directing the crowd gathered around him through this loudspeaker. (T. Page 150, 151-153.) Substantially upon the foregoing evidence, the trial court found petitioner guilty of the offense charged and the Louisiana State Supreme Court refused to grant writs of certiorari in the matter.

Petitioner, at pages 2 and 3 of his brief sets forth what he claims are the two federal questions presented herein. The first question presented by petitioner was never understood as being a question in this case. It is the state's contention that the question herein is posed by the issue between the State of Louisiana and petitioner, as is revealed by the reading of the bill of information. Specifically the question is whether or not the evidence has revealed beyond a reasonable doubt that this accused violated the ordinance in ques-

tion by operating and permitting the operation of a mechanical contrivance to which loudspeakers were attached, in such a manner as to be a nuisance to the neighborhood. Petitioner was not arrested nor tried for merely turning on a loudspeaker, nor was he arrested and tried for merely turning on a loudspeaker during a meeting to protest racial segregation and allegedly oppressive law enforcement. As previously mentioned, he was arrested, tried and convicted for operating and permitting the operation of a mechanical contrivance and device to which loudspeakers were attached in such manner as to be a nuisance to the neighborhood. The substance of what petitioner may or may not have said on that occasion was not and is not at issue in this matter. As petitioner stated at page six of his brief, none of the state witnesses knew much about what petitioner allegedly said over said loudspeaker; it is, thus, quite clear that not only was petitioner not charged or tried for the substance of what he may have said, but that there was no evidence of what was said by him.

As reasons for the granting of this writ, petitioner urges that his conviction was based upon the testimony of four police officers and their supervisor. It is not suggested to this court why the testimony of four police officers and their supervisor is insufficient to sustain a conviction. As a matter of fact, under the law of the state of Louisiana, there exists a presumption that witnesses have told the truth and there exists, also, a presumption that public officers have done their duty. LSA-R.S. 15:432. The evidence re-

vealed that these police officers and their supervisor happened to be in the immediate area of the place of this alleged offense and, thus, were in a position to be proper witnesses in this case. They were not called as witnesses because they were police officers, but because they happened to be in the area, heard the noise emanating from the loudspeaker and saw the crowd blocking the street and sidewalks around the loudspeakers.

It is next contended that writs should be granted herein because petitioner was convicted on a vaguely-worded charge of "nuisance." As previously stated, the charge as set forth in the bill of information is "unlawfully did violate an ordinance of the police jury of East Baton Rouge Parish, Louisiana, in that he did operate and permit the operation of a mechanical contrivance and device to which loudspeakers were attached in such manner as to be a nuisance to the neighborhood." It is not indicated by petitioner in what specific manner the said charge is vague, nor is it indicated which certain words or phrases are allegedly vague in the charge.

It is submitted that while some of the words contained in the charge may be abstract words, that they have, through daily use, acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden. The word "nuisance" is well-known and accepted and understood to be a highly obnoxious or annoying thing or person: (2) something offensive or annoying to individuals or community, to the prejudice of their legal rights. See

The American College Dictionary, 1960 Ed. *Kovacs v. Cooper*, Judge, 336 U.S. 77.

In his reasons for granting writs herein, petitioner attempts to absolve himself from the nuisance resulting by others congregating around the loudspeaker and blocking vehicular and pedestrian traffic, by urging that the responsibility of the actions of others cannot be placed upon him. There is a legal presumption in Louisiana law that the defendant intended the natural and probable consequence of his act and that he is responsible for his actions. LSA-R.S. 15:432.

It is respectfully submitted that the most common and typical, natural and probable consequence of the act of a person using a loudspeaker upon the streets would be the congregation of people; a natural and probable consequence which occurred in this case. The very purpose of the use of a loudspeaker or a similar contrivance is to obtain the attention, and call for the congregation, of a large number of people.

Petitioner, in his brief, attempts to limit the nuisance herein to that only which could be derived from the volume of noise emanating from the loudspeaker. The record will show in this case that the other factual circumstance constituting a nuisance herein was the blocking of the sidewalks and streets in the area of the loudspeaker.

It is further urged as reasons for granting of writs herein that the refusal of the trial judge to order desegregation of the court room raises the most serious

questions about the proper administration of justice. It is not specified how segregated seating in the court room would have any serious bearing upon the proper administration of justice. The Louisiana Supreme Court in the recent case of *State of Louisiana v. B. Elton Cox*, 158 So. 2d 172, at page 178, Syllabus 9, with reference to the identical contention, said:

> "The final error complained of in this case—that the spectators in the courtroom in which Cox was tried were segregated, thus denying him a fair trial in violation of the Sixth Amendment to the federal constitution, and the equal protection and due process clauses of the Fourteenth—was adjudicated adversely to the defendant in our decision in the companion cases.
>
> "Counsel do not claim that Cox did not receive a fair and impartial trial in accordance with the accepted rules and regulations fixed for the orderly trial of cases in the courts of this state, as required by our constitution and statutes, or point out in what manner he was prejudiced by the separation of the spectators in the courtroom where he was tried. Instead, it is contended that the constitutional rights of "these spectators" were violated during the process of his trial, and it is his right to assert the denial of the rights of these people purportedly occurring.
>
> "One need only review the record in this case to readily discern the defendant received a fair and impartial trial, being given every consideration and protection afforded all persons accused of crimes under our constitution and laws by a judge who acted throughout with great patience and

forebearance in an effort to maintain a reasonable semblace of order in the courtroom during the trial, as well as to accommodate the colored spectators, even authorizing the use by them of all seats not then occupied by the white people. Finally, on the third day of the trial, he went so far as to have an officer of the court count the number of seats still vacant and then go into the corridors outside the courtroom and inform those congregated there of their availability. Nevertheless, the trial continued with many still remaining vacant.

"To hold, as contended by Cox, that his conviction is a nullity merely because of the segregated condition of the courtroom would of necessity, make every conviction of an accused during the past years in all of the courts of the state, and regardless of race, nullities, with the result that everone now confined in our penal institutions would be entitled to have his conviction set aside, and these thousands of criminals would then be turned loose on the people of the state.

"For the reasons assigned, the conviction and sentence are affirmed."

Under LSA-R.S. 15:557, it is stated:

"§557. Matters not grounds for reversal; exception

"No judgment shall be set aside, or a new trial granted by any appellate court of this state, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an exam-

> "ination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

In view of the foregoing, it is inconceivable how it could be seriously urged that the violation of some spectator's right in a courtroom could be urged by an accused to his benefit and, additionally, how such violation could be urged as probably resulting in a miscarriage of justice or a prejudicial error to the substantial rights, constitutional or statutory, of an accused.

Additionally, petitioner alleges that his arrest and conviction in this case violated his constitutional rights of free speech and free assembly under the "due process" clause of the Fourteenth Amendment. In that connection, he cites *Saia v. N. Y.*, 344 U.S. 558, and *Kovacs v. Cooper*, 336 U.S. 77. In a further attempt to pursuade this honorable court to grant writs herein, petitioner avers that the two cited cases are confusing and that this Honorable Court in order to clarify the jurisprudence of this particular issue, should grant writs herein. The ordinance involved in *Saia v. N. Y.*, was:

> ". . . Section 2. Radio devices, etc.—It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the

> sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises.
>
> "Section 3. Exception—Public dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

At page 1149 of 344 U.S., the Court said:

> "We hold that section three is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the first amendment which isprotected by the Fourteenth Amendment against state action. To use a loudspeaker or amplifier, one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. . . ."

Thus, in *Saia v. People of the State of New York*, only Section 3 of the Ordinance was declared unconstitutional.

The ordinance involved in *Kovacs v. Cooper*, Judge, 336 U.S. 77, provided:

> "4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising

> purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public palces aforementioned."

This ordinance was challenged on the grounds that it was violative of the constitutional rights of freedom of speech, freedom of assemblies and freedom to communicate information and opinions to others. The ordinance was also challenged as violative of the due process clause of the Fourteenth Amendment on the ground that it was obscure, vague and indefinite as to be impossible of reasonably accurate interpretation. This Honorable Court found the words of said Section 4 of the ordinance in compliance with the requirements of definiteness and clarity as heretofore discussed.

This Court, in Kovacs, speaking of the Saia case, stated:

> "When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement. The Court said in the Saia case, 334 U.S. at pages 560, 561, 68 S. Ct. at pages 1149, 1150:
>
> > 'The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communi-

> cation as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine."

"This ordinance is not of that character. It contains nothing comparable to the above quoted § 3 of the ordinance in the Saia case."

"Unrestrained use throughout a municipality of all sorts of amplifying devices would be intolerable. Absolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in time, place and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activity." *Kovacs v. Cooper*, 69 S. Ct. 448.

"Courts are inclined to adopt that reasonable interpretation of the statute which removes it farthest from possible constitutional infirmity." *Kovacs v. Cooper*, 336 U.S. 85.

The ordinance in question here regulates the playing and operation of phonographs, radios, bands, or any other mechanical contrivances or devices which have loud speakers attached thereto, in such manner as not to be a nuisance to the neighborhood. Thus, there is no previous unrestricted censorship as in *Saia*, and the prohibition is not absolute, but the regulation is limited to such operation and playing as not to be a nuisance to the neighborhood.

This Court, in Kovacs, recognized the right of the legislature to regulate sound trucks with amplifiers or loud speakers so as to protect the rights of

others to peace, quiet, tranquility and, also, to protect the rights of others to utilize the streets and sidewalks. As stated at page 88 of Kovacs, this Court said:

> "Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the street." *Schneider v. State of N. J.*, 308 U.S. 147, 160, 161, 60 S. Ct. 146, 150, 84 L.Ed. 155.
>
> "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. . . . Section of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamplets, by dossiers. We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound-amplifying devices justifies the ordinance."

Mr. Justice Frankfurther, in Kovacs, concurring with the majority opinion, at page 96, 336 U.S., states:

> "Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice. . . . So long as a legislature does not prescribe what ideas may be noisily ex-

> pressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society."

Further, in Kovacs, Mr. Justice Jackson, concurring at page 97, states:

> "I join the judgment sustained the Trenton ordinance because I believe that operation of mechanical sound-amplifying devices conflicts with quiet enjoyment of home and park and with safe and legitimate use of street and market place, and that it is constitutionally subject to regulation or prohibition by the state or municipal authority."

In Kovacs, at page 98, Mr. Justice Black, dissenting, states:

> "The question in this case is not whether appellant may constitutionally be convicted of operating a sound truck that emits 'loud and raucous noises.' The appellant was neither charged with nor convicted of operating a sound truck that emitted 'loud and raucous noises.' The charge against him in the police court was that he 'violated the city ordinance 'in that he did, on South Stockton Street, in said City, play, use and operate a devise known as a sound truck.' The record reflects not even a shadow of evidence to prove that the noise was either 'loud or raucous,' unless these words of the ordinance refer to any noise coming from an amplifier whatever its volume or tone."

Continuing at page 100, Mr. Justice Black said:

> "It thus appears that the appellant was charged and convicted by interpreting the ordinance as an absolute prohibition against the use of sound amplifying devices. . . ."

Continuing at page 101, Mr. Justice Black said:

> "The New Jersey ordinance is on its face, and as construed and applied in this case by that state's courts, an absolute and unqualified prohibition of amplifying devices on any of Trenton's streets at any time, at any place, for any purpose, and without regard to how noisy they may be."

Further, in Kovacs, Mr. Justice Rutledge, also dissenting, at page 104, states:

> "I am in accord with the views expressed by my brother BLACK. I think it important, however, to point out that a majority here agree with him that the issue presented is whether a state (here a municipality) may forbid all use of sound trucks or amplifying devices in public streets, without reference to whether 'loud and raucous noises' are emitted."

It is thus apparent that the dissent in Kovacs is based principally upon the basis that the ordinance at issue prohibited the use of sound trucks or amplifying devices without reference to the nuisance which resulted therefrom. The dissent entertained the view that this accused, in Kovacs, stood convicted of a crime for which he was not charged and of which there was no evidence.

CONCLUSION

Both Saia and Kovacs recognize the right of a state or municipality to regulate loud speakers and similar sound devices. The ordinance in question here is such a regulation by the Police Jury of East Baton Rouge Parish, Louisiana. The ordinance in question does not contain the objectionable feature of the ordinance in Saia, which established a previous restraint or regulation on the right of free speech. This ordinance in question does not even contain the objectionable feature of an absolute prohibition against such sound devices mentioned in the dissenting opinion in Kovacs; rather, the ordinance in question regulates the operation of such loud speakers so that they will not be a nuisance to the neighborhood. A nuisance is a well-understood word. A nuisance is identified as a "highly obnoxious or annoying thing or person; sometimes offensive or annoying to individuals or to the community, to the prejudice of their legal rights." Thus, it will be seen by use of the word "nuisance" in the ordinance and in the charge herein, in effect, the operation of loudspeakers is regulated as to all of the elements which may conceivably constitute a nuisance to the neighborhood, such as time, place and decibels.

It is, therefore, respectfully submitted, that on the basis of Saia and Kovacs, the writ herein applied for should be denied.

Respectfully submitted,

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